Petition

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No. 81-171

In the Supreme Court of the United States

October Term, 1980

OESTERLEN SERVICES FOR YOUTH, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the National Labor Relations Board (herein referred to as the "Board"), erred in certifying the Service, Hospital, Nursing Home and Public Employees Union, Local No. 47 (herein referred to as the "Union"), as the collective bargaining representative of certain employees of Oesterlen Services for Youth, Inc. (herein referred to as the "Employer"), when, during the representation election, the Union observer improperly distracted an employee who was waiting to cast her ballot by engaging her in a prolonged conversation contrary to a long standing policy of the Board.

2. Whether the Sixth Circuit Court of Appeals erred in enforcing the Board's order that the Employer bargain with the Union when the Seventh Circuit Court of Appeals had earlier interpreted the Board policy in a contrary manner.

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No.

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OPINIONS BELOW

The order of the National Labor Relations Board was entered on July 19, 1979, and is reported at 243 NLRB No. 88 (1979). The Order of the Court of Appeals was entered on May 13, 1981 and is known on the records of said Court as Case No. 79-1554.

JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit was entered on May 13, 1981, and a copy hereof is set forth in the Appendix to this Petition. On May 27, 1981, Petitioner timely filed with the Court of Appeals its Petition for Rehearing; such Petition was denied by

that Court on June 8, 1981. A copy of that Order is also set forth in the Appendix to this Petition.

The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) and 29 U.S.C. §160(e).

STATUTES

The statutes involved in the instant case provide, in pertinent part, as follows:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. §151, *et seq.*)

Section 8(a) (29 U.S.C. §158(a)).

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7; . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

Section 10(e) (29 U.S.C. §160(e)).

> The Board shall have power to petition any United States court of appeals, within any circuit, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be

served upon such person, and thereupon shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board.

. . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

. . . Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

STATEMENT OF THE CASE

I. Nature of the Case:

Proceedings and Decisions Below:

The Board instituted this action in the Court of Appeals for the Sixth Circuit pursuant to Section 10(e) of the Act[1] seeking enforcement of its Order issued July 19, 1979. The Board had held, in substance, that the Employer had committed an unfair labor practice by refusing to bargain with the Union with respect to the wages, hours and other terms and conditions of employment of

1. 29 U.S.C. §160(e).

certain of its employees[2] in violation of Section 8(a)(1) and (5) of the Act,[3] and ordered the Employer to bargain collectively with the Union. The Employer has maintained throughout that the Board's Order should not be enforced as the Union had been improperly certified as the collective bargaining representative of the aforementioned employees. The Employer had timely filed five (5) objections with the Board, in regard to the representation election proceedings, which objections were then reviewed by the Board. The Board overruled the Employer's objections to the conduct of the election and certified the Union as the collective bargaining representative on December 11, 1978 in its Case No. 9-RC-12556. The record of those proceedings was made a part of the record before the Court of Appeals pursuant to Section 9(d) of the Act.[4]

The Sixth Circuit Court of Appeals determined that it would not disturb the conclusions of the Board and ordered the enforcement of the Board's Order on May 13, 1981.

II. Statement of the Facts

Oesterlen Services for Youth, Inc., the Petitioner herein, operates a mental health care facility in Springfield, Ohio. On July 20, 1978, the Union filed a representation petition with the Board seeking certification as the collective bargaining representative of all child care service workers employed by the Employer.

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2. The bargaining unit was defined in the Decision, Order and Direction of Election in Case No. 9-RC-12556 (as corrected by Erratum dated September 25, 1978) to read as follows: "All child care workers, recreation workers, cooks, housekeepers, houseparents, and maintenance men employed by the Employer in its residential treatment program in Springfield, Ohio, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act."

3. 29 U.S.C. §158(a)(1) and (5).

4. 29 U.S.C. §159(d).

At the direction of the Board, an election was held on October 20, 1978. Seventeen (17) votes were cast for the Union and twelve (12) votes were cast against it. There were four (4) challenged ballots.

On October 27, 1978, the Employer timely filed five (5) objections to the conduct of the election together with a supporting affidavit from the employee who had been the Employer's election observer. The objections alleged, *inter alia*, that the Board agent conducting the election had left the polling area during the scheduled voting time for approximately fifteen (15) to twenty (20) minutes and thereby made himself unavailable to distribute ballots or monitor and supervise the conduct in the polling area as required by established Board procedure. The Employer further alleged that during the Board agent's absence the Union observer, Keith Compton, engaged an employee who was waiting to vote in a prolonged conversation regarding working conditions, time off, staffing problems and overtime. The Employer maintains that the Board's failure to control the Union observer's distracting conversation with a prospective voter during that period immediately preceding actual voting is a substantial interference with employee rights that has been explicitly proscribed by the Board and requires at least a second election.

Pursuant to Section 102.69 of the Rules of the National Labor Relations Board,[5] an investigation was conducted of the issues raised by the Employer's objections; however, no hearing on the objections was held.

Following the investigation, the Board issued its Supplemental Decision and Certification of Representative in

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5. 29 C.F.R. §102.69.

which it made the following findings of fact: The election was conducted between the hours of 2:30 and 4:00 in an administration building of the Employer's facility. The Employer's observer, Deanna Markley, stated that the Board agent left the polling area at about 2:50 or 2:55 at which time she heard him ask the receptionist, who was stationed across the hall, for directions to the restroom. The Board agent returned to the polling area, took the unused ballots and told the observers that he was going to the restroom. He instructed them to tell employees who came to vote that they would not be able to vote until he returned.

It is undisputed that three (3) employees presented themselves to vote during the Board agent's absence. One claimed that he went to the polls at 2:45 and saw the Board agent leaving the room. He was told by Compton, the Union observer, that he could not vote until the Board agent returned. As a result, the employee indicated that he was unable to vote until between 3:05 P.M. and 3:10 P.M. The second employee reported that she went to the polling area at about 2:50 P.M. and waited five (5) to ten (10) minutes to vote, while the third employee stated that he went to the polls at about 3:10 P.M. and the Board agent had not yet returned. The Union observer said he did not know what time the Board agent left or returned, but believed he was gone approximately seven (7) to ten (10) minutes. The Board does not state in its Supplemental Decision whether or not it questioned the Board agent himself or, if so, what the results of its inquiry were.

The Employer's observer, Deanna Markley, further reported that the Union observer engaged in a prolonged conversation with one of the waiting voters during the

Board agent's absence. According to Ms. Markley, this employee, Kathryn Long, arrived at the polls about five (5) minutes after the Board agent had left the room and seated herself behind the election observers where she remained until the Board agent returned. Ms. Markley heard the Union observer, Mr. Compton, tell the waiting employee that he was tired of working as many hours as he had been with only one full day off a week and that he had heard of an employee who had worked a trial week and quit. The waiting employee was heard to tell the Union observer, Mr. Compton, that her Saturday schedule had been changed. The Board made no findings as to the duration of the conversation, although the Employer's observer's affidavit supports the conclusion that it lasted ten (10) to fifteen (15) minutes.

Despite this failure to make the essential determination as to the duration of the conversation, the Regional Director of the Board concluded that the remarks were "nothing more than polite conversation and do not constitute electioneering," overruled the Employer's objections and certified the Union as the exclusive bargaining representative of the employees described in footnote 2, *infra*, on December 11, 1978. The Employer submitted its Request for Review of the Supplemental Decision and Certification to the Board alleging that the Regional Director's Decision departed from established Board precedent and that it was based on a substantial factual issue which was clearly erroneous on the record. The Request for Review was denied by the Board on February 5, 1979.

As it was the position of the Employer that the Union had been improperly certified and it would have been improper for it to enter into collective bargaining under such circumstances, the Employer did decline to bargain with the

Union. However, the Board did not accept the Employer's position and ordered it to bargain with the Union.

Some time thereafter, the Board petitioned the Court of Appeals for the Sixth Circuit to enforce the Board's Order to bargain. It is because of the Sixth Circuit decision to enforce the Board's Order that the Employer now petitions this Court for a Writ of Certiorari.

ARGUMENT

I. The Decision of the Court of Appeals Herein Is in Conflict With a Decision of the Court of Appeals for the Seventh Circuit to the Extent That the Decision Is in Any Way Predicated on an Examination of the Content of the Remarks Made by the Union's Election Observer.

To determine whether the Board erred in finding that the Employer violated the Act by refusing to recognize and bargain with the Union, it was incumbent on the Court of Appeals to first determine whether the Board acted properly in certifying the Union as the bargaining representative of the Employer's employees. *NLRB v. Bostic Div., USM Corp.*, 517 F.2d 917 (6th Cir. 1975). In order to make that determination as to the propriety of the certification, it is necessary to review the objections to the election as filed by the Employer and the disposition of them by the Board's Regional Director's Supplemental Decision and Certification of Representative. Such a review demonstrates that the laboratory conditions required by the Board for representation elections were destroyed by the conduct of its own agent and by the conduct of the Union's observer.

A. The Board Is Obligated to Insure That a Representation Election Be Conducted Under "Laboratory" Conditions in Order That the Uninhibited Desires of the Employees Might Be Determined.

The Board's certification of the Union in this case is inconsistent with its declared policy enunciated in *Milchem, Inc. v. NLRB*, 170 NLRB 362 (1968), in which any prolonged conversations between a party to an election and an employee waiting to vote are strictly prohibited. Under the *Milchem* rule such conversations required that the election be set aside and a second election ordered. Such rule is founded on the Board's general policy with regard to the protection of the integrity of representation elections as expressed in *General Shoe Corporation*, 77 NLRB 124, 127 (1948):

> In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible to determine the uninhibited desires of the employees. It is [the Board's] duty to establish those conditions; it is also [the Board's] duty to determine whether they have been fulfilled. When, in the rare extreme case, the standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again.

Applying this basic principle in *Milchem*, the Board declared that the requisite laboratory conditions are not present when representatives of any party to an election engage in prolonged conversations with employees waiting to vote, regardless of the content of the conversation. Accordingly, the Board ordered a new election in *Milchem* when a union official stood within a few feet of employees

waiting to vote and engaged them in a conversation "concerning the weather and like topics" for "perhaps five minutes." The Board held in *Milchem*, 170 NLRB at 362, that:

> . . . The *potential* for distraction, last minute electioneering or pressure, and unfair advantage from *prolonged conversation* between representatives of any part to the election and voters waiting to cast ballots is of sufficient concern to warrant a strict rule against such conduct, without inquiry into the nature of the conversations . . . A *blanket prohibition against such conversations* is easily understood and simply applied. (Emphasis added).

The Board further held that:

> The rule contemplates that conversations between a party and voters while the latter are in a polling area waiting to vote will normally, upon the filing of proper objections, be deemed prejudicial *without investigation into the content of the remarks.* (Emphasis added).

The Board noted that by adding the sanction of a new election upon the breach of the rule, "assures that the parties will painstakingly avoid casual conversations which could otherwise develop into undesirable electioneering or coercion." *Milchem*, 170 NLRB at 363.

While the Board recognized that not all "chance, isolated, or innocuous" comments will necessarily void the election, it held that a five (5) minute conversation by a party with a voter regarding "the weather and like topics . . . could not in any view of the evidence be dismissed as minimal." *Milchem*, 170 NLRB at 364. The election was set aside and a second election ordered.

B. The Decision of the Court of Appeals Herein Is in Conflict With a Decision of the Seventh Circuit in Finding That the Board Had Not Acted Arbitrarily and Capriciously in Certifying the Union and Holding That the Union's Election Observer's Conduct Did Not Destroy the Laboratory Conditions Required for a Fair Election.

The record in the instant case indicates that the conversation of the Union observer with the employee waiting to vote lasted as long as fifteen (15) minutes. Such a prolonged conversation constitutes a *per se* violation of the *Milchem* rule as pointed out by the Seventh Circuit in *Midwest Stock Exchange v. NLRB*, 620 F.2d 629, 633 (1980):

> Without defining the point at which a 'trifling' comment becomes a prolonged conversation, the Board set aside an election where a union representative had engaged in an estimated five minute conversation. *Thus it is clear that a five minute conversation is not de minimus and requires a second election.* (Emphasis added).

The Seventh Circuit thereby recognized that the touchstone of the *Milchem* rule is the duration of the conversation and not the content. Nonetheless, the Sixth Circuit in the instant case departed from this approach and seems to imply that the *Milchem* rule is only a prohibition against last minute electioneering. The Court states:

> [T]he record supports the Board's finding that the Union observer's conversations constitute nothing more than "innocuous" conversation which did not constitute electioneering. (Order, p. A3).

Such an approach is in conflict with that of the Seventh Circuit Court of Appeals described in *Midwest Stock Ex-*

change above and perverts the *Milchem* rule to the extent that the Sixth Circuit's decision is predicated in any way upon a consideration of the content of the conversation rather than its duration. The potential for electioneering was but one of the reasons for the Board's adoption in *Milchem* of a "strict rule" against prolonged conversations with employees waiting to vote. As aptly noted by the Seventh Circuit in *Midwest Stock Exchange,* 620 F.2d at 634:

> "The Board explained that it was also concerned that the voters would be distracted during the final minutes before they cast their votes. These last few moments before voting, the Board reasoned, should be the voter's own, 'as free from interference as possible'; a time during which a voter can consult his own conscience without interruption."

The nature of the comments made by the Union observer is, therefore, irrelevant. The concern is as to any distraction of the employee during the last few moments prior to voting. They are to be as free from interference as possible. The "blanket prohibition" against prolonged conversation applies without regard to its content—even to conversations regarding "the weather and like topics." *Milchem,* 170 NLRB at 363.

II. The Decision of the Court of Appeals Herein Is in Conflict With a Decision of the Seventh Circuit Regarding the Proper Scope of Review of Board Orders.

While the Board admittedly has wide discretion in the initial promulgation of rules designed to protect the integrity of representation elections, the courts of appeals bear the responsibility of reviewing the Board's specific

application of its rules. As Judge Peck noted in *Midwest Stock Exchange v. NLRB*, 620 F.2d at 632:

> Judicial review in these cases is not concerned with the wisdom of the Board's policy but must determine whether the record as a whole supports the findings and conclusions respecting compliance with the policies, rules and regulations promulgated by the Board . . . Where the Board has promulgated standards governing the conduct of an election, those standards are controlling until the Board announces a change and its reasons for the change. Until such a change is announced, *the Board's application of its standards must be reasonably consistent with its previous decisions.* (Emphasis added).

Counsel for the Board acknowledged in oral argument in the Court below that the Board had failed to make the essential finding of fact in this matter as to the duration of the conversation between the union's election observer and the employee waiting in the polling area to vote. The *Milchem* rule requires that such a finding be made. In other words, to properly apply the *Milchem per se* rule, it is essential to determine if the conversation at issue is a prolonged one. The Board made no such determination. Nor did the Board announce a change in the *Milchem* rule or the reasons therefor. Its decision completely fails to explain how a five (5) minute conversation regarding the "weather and like topics" requires a new election, as it did in *Milchem*, while a much longer conversation regarding working conditions, time off, overtime, and staffing merely constitutes "polite conversation" which does not require a second election in the case at hand. In and of itself, the prolonged conversation of the Union observer with the employee during that period immediately preceding the vote adversely affected that employee's rights and should require a second election.

The Board could not have been clearer in *Milchem*, 170 NLRB at 362, when it stated that:

> We believe that the sustained conversation with prospective voters waiting to cast their ballots, *regardless of the content of the remarks exchanged*, constitutes conduct which, in itself, necessitates a second election. (Emphasis added).

The Board's decision in the instant matter covertly attempts to eviscerate this long established principle without setting forth its reasons therefor. The Board's application of its standards were, therefore, inconsistent with previous decisions and its order should not have been enforced. The Sixth Circuit's decision is in conflict with the Seventh Circuit's decision to the extent that it permits the Board to eviscerate its own established policy in *Milchem* without setting forth the reasons for the change.

CONCLUSION

In conclusion, the Court of Appeals' proper function in this case was "merely to test the fairness of the Board's application of its own standard" and not to "pass upon the wisdom of the *Milchem* rule." *Midwest Stock Exchange v. NLRB*, 620 F.2d at 634. In the case at bar, the Board's application of its rule was inconsistent with *Milchem* and in conflict with the Seventh Circuit Court of Appeals decision in *Midwest Stock Exchange* to the extent that its decision was predicated on a consideration of the content of the prolonged conversation and to the extent that the Court sought to fashion a new rule regarding such conversations.

WHEREFORE, Petitioner respectfully requests that its Petition for Writ of Certiorari be granted and that enforce-

ment of the Court of Appeals' Mandate be stayed until final disposition by this Court.

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CERTIFICATE OF SERVICE

Pursuant to Rule 28 of the Rules of the Supreme Court, the undersigned hereby certifies that three (3) copies of this Petition for Writ of Certiorari have been served by first class mail upon the following on this 17th day of July, 1981:

Mr. Elliott Moore
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Courtesy copies of the Petition for Writ of Certiorari have been sent by first class mail to the following on this 17th day of July, 1981:

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APPENDIX

(Filed May 13, 1981)

No. 79-1554

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

OESTERLEN SERVICES FOR YOUTH, INC.,
Respondent.

ORDER

BEFORE: MERRITT, BROWN, and JONES, Circuit Judges.

Oesterlen Services for Youth, Inc., operates a mental health care facility in Springfield, Ohio. On October 20, 1978, an election was conducted among certain employees to determine whether they wished to be represented by the Service, Hospital, Nursing Home and Public Employees Union, Local No. 47 (the Union). Of approximately 36 eligible voters, 17 voted for the Union, 12 voted against, and four ballots had been challenged. The number of challenged ballots was not sufficient to affect the results of the election.

On October 27, Oesterlen filed five objections to the election alleging that certain actions of the Board's agent and of the Union's observer prevented a fair election. The Regional Director conducted an administrative investigation. On December 11, the Regional Director overruled

all of the Company's objections. The Board affirmed. Oesterlen refused to bargain with the Union. Thus, the Board petitioned for enforcement of its Order that Oesterlen violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. §151, *et seq.* by refusing to bargain with the duly certified collective bargaining representative of its employees. Applying the well settled rule that "a party who seeks to overturn the results of a representation election has the burden to show that the election was not fairly conducted, *NLRB v. Bostik, Division, USM Corp.*, 517 F.2d 971, 975 (6th Cir. 1975), we grant enforcement.

During the election, the Board agent absented himself from the polling area for ten minutes, and took with him the unused ballots. Though he failed to seal the ballot box, both the Union's and Oesterlen's observers constantly watched the box. Three employees presented themselves to vote. Each employee was told that they could vote when the Board agent returned. The three employees subsequently voted. Oesterlen contends that the employees who failed to vote may have been influenced by the Board agent's action in leaving the polls and leaving the ballot box with the observers. However, no evidence has been presented in support of such contention. The employees known to have been in the polling area during the Board agent's absence eventually cast a ballot. On the basis of the above cited facts, we agree with the Board that the integrity of the election had been maintained. *Compare Anchor Coupling Co., Inc.*, 171 NLRB 1296 with *Kerona Plastics Extrusion Company*, 196 NLRB 1120 (1972).

Oesterlen also contends that the Union's observer engaged in unlawful electioneering with several of the employees. The Union's observer exchanged pleasantries mostly every voter. During the Board agent's absence,

one employee who wished to vote seated herself behind the observers' table and began a conversation with the Union observer. Oesterlen's observer stated that the two discussed their work schedules as well as the fact that another employee had worked a full week bfeore deciding to quit. Apparently, most employees know after one day whether they like the job. Additionally, the Union's observer stated to one employee that he intended to be at the site of the Union's organizational meetings later that evening. Finally, in response to a voter's question concerning the turnout at the polls, the Union observer stated his belief that "more" employees would probably vote at the shift change.

It is a well settled Board rule that prolonged conversations between observers and voters in the polling area are deemed prejudicial without investigation as to the content of the conversations. *Milchem, Inc.*, 170 NLRB 362 (1968). *See also Midwest Stock Exchange v. NLRB*, 620 F.2d 629 (7th Cir. 1980). However, not "any chance, isolated, innocuous comment or inquiry by an observer to a voter will necessarily void the election." *Milchem* at 363. The reasons for the rule set forth in *Milchem* are not difficult to fathom. As was aptly stated in *Midwest Stock Exchange*:

> The Board reasoned that the potential for distraction last minute electioneering, and unfair advantage, justified a 'strict rule' against such conduct without requiring an examination into the substance or effect of the conversations.

Applying these well settled principles to the above-cited facts, we hold that the record supports the Board's finding that the Union observer's conversations constitute nothing more than "innocuous" conversation that did not constitute electioneering.

We have reviewed Oesterlen's other allegations of error and find that they are without merit.

Accordingly, the Board's Order is ENFORCED.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

ISSUED AS MANDATE: JUNE 30, 1981

(Filed June 30, 1981)

No. 79-1554

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

OESTERLEN SERVICES FOR YOUTH, INC.,
Respondent.

ORDER

BEFORE: MERRITT, BROWN and JONES, Circuit Judges

The motion of Respondent to stay mandate pending application for writ of certiorari is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 9-CA-13684

OESTERLEN SERVICES FOR YOUTH, INC.

and

SERVICE HOSPITAL, NURSING HOME AND PUBLIC EMPLOYEES UNION, LOCAL NO. 47, AFFILIATED WITH THE SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO

DECISION AND ORDER

Upon a charge filed on April 2, 1979, by Service, Hospital, Nursing Home and Public Employees Union, Local No. 47, affiliated with the Service Employees International Union, AFL-CIO, herein called the Union, and duly served on Oesterlen Services for Youth, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 9, issued a complaint and notice of hearing on April 19, 1979, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on December 11, 1978, following a Board election in Case 9-RC-12556, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found

appropriate;[1] and that, commencing on or about March 13, 1979, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. Thereafter, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On May 10, 1979, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment with exhibits attached. Subsequently, on May 22, 1979, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a document entitled "Memorandum in Opposition to the General Counsel's Motion for Summary Judgment" as its response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint, Respondent admits the request and refusal to bargain. In its response to

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1. Official notice is taken of the record in the representation proceeding, Case 9-RC-12556, as the term "record" is defined in Secs. 102.68 and 102.69 (g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.VA., 1957); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1966); Sec. 9(d) of the NLRA, as amended.

the Notice To Show Cause, however, Respondent asserts that the Union's certification was improper on the basis of Respondent's objections to the election in the underlying representation proceeding.

Review of the record herein, including the record in Case 9-RC-12556, reveals that, pursuant to a Decision and Direction of Election issued by the Regional Director for Region 9, an election was conducted on October 20, 1978, which resulted in a vote of 17 votes for and 12 votes against the Union, with 4 challenged ballots. Thereafter, Respondent filed timely objections to the conduct of the election and to conduct affecting the results of the election, alleging in substance that during the election: (1) the Board agent supervising the election left the polling area with the ballot box unsealed; (2) the union observer engaged in electioneering while the Board agent was absent by passing a note to a voter and talking with voters in the polling area; and (3) the union observer had an unofficial voter eligibility list on the table in the polling area.

After investigation, the Regional Director issued his Supplemental Decision and Certification of Representative on December 11, 1978, in which he overruled Respondent's objections in their entirety and certified the Union as the exclusive bargaining representative of the employees in the appropriate unit. Thereafter, Respondent filed a request for review of the Regional Director's supplemental decision. By telegraphic order dated February 5, 1979, the Board denied Respondent's request for review. It thus appears that Respondent in this proceeding is attempting to relitigate issues fully litigated and finally determined in the representation proceeding.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circum-

stances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[2]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege any special circumstances which would require[3] the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding.

In this proceeding, Respondent contends, in effect, that due process entitles it to a hearing on its objections to the election. Prior to denying Respondent's request for review, the Board considered the Regional Director's supplemental decision and the matters raised in the request for review, including Respondent's contention that a hearing on its objections was warranted.

By denying Respondent's request for review, the Board necessarily found that the objections raised no substantial or material issues warranting a hearing.[4] Further, it is

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2. See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

3. Respondent asserts here that in its request for review it set forth "special circumstances" warranting the Board's reexamination of the representation proceeding. It did not, however, in its request for review specifically state what these "special circumstances" were nor does it do so in this proceeding. Furthermore, the Board in its telegraphic order denying Respondent's request for review indicated that there were no substantial or material issues warranting review.

4. See *Madisonville Concrete Co., a Division of Corum & Edwards, Inc.*, 220 NLRB 668 (1975); *Evansville Auto Parts, Inc.*, 217 NLRB 660 (1975).

well established that the parties do not have an absolute right to a hearing on objections to an election. It is only when the moving party presents a *prima facie* showing of substantial and material issues which would warrant setting aside the election that it is entitled to an evidentiary hearing. It is clear that, absent arbitrary action, this qualified right to a hearing satisfies the constitutional requirements of due process.[5] Accordingly, we grant the Motion for Summary Judgment.[6]

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of Respondent

Respondent, an Ohio corporation, is engaged in the operation of a mental health care facility at Springfield, Ohio. During the 12-month period preceding issuance of the complaint, a representative period, Respondent received gross revenues in excess of $250,000 and purchased and received goods and materials valued in excess of $50,000 from suppliers located in the State of Ohio, each of which, in turn, purchased and received the said goods and materials at their locations in the State of Ohio directly from points outside the State of Ohio.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer

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5. *CTE Lenkurt, Incorporated*, 218 NLRB 929 (1975); *Heavenly Valley Ski Area, a California Corporation, and Heavenly Valley, a Partnership*, 215 NLRB 734 (1974); *Amalgamated Clothing Workers of America* [*Winfield Manufacturing Company, Inc.*] *v. N.L.R.B.*, 424 F.2d 318, 828 (D.C. Cir. 1970).

6. In its answer to the complaint, Respondent denies the allegation that a majority of the employees designated and selected the Union as their representative for purposes of collective bargaining. Respondent, however, does not dispute the validity of the tally of the ballots. We therefore find that Respondent's denial raises no substantial or material issue warranting a hearing.

engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Service, Hospital, Nursing Home and Publi Employees Union, Local No. 47, affiliated with the Service Employees International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All child care workers, recreation workers, cooks, housekeepers, house parents, and maintenance men employed by the Respondent in its Residential Treatment Program at Springfield, Ohio; excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

2. The certification

On October 20, 1978, a majority of the employes of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 9, designated the Union as their representative for the purpose of collective bargaining with Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on December 11, 1976, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about December 18, 1978, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about March 13, 1979, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collecting bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since March 13, 1979, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor dispuutes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative

of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Oesterlen Services for Youth, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Service, Hospital, Nursing Home and Public Employees Union, Local No. 47, affiliated with the Service Employees International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All child care workers, recreation workers, cooks, housekeepers, house parents, and maintenance men employed by the Respondent in its Residential Treatment Program at Springfield, Ohio; excluding all office clerical employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since December 11, 1978, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about March 13, 1979, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Oesterlen Services for Youth, Inc., Springfield, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Service, Hospital, Nursing Home and

Public Employees Union, Local No. 47, affiliated with the Services Employees International Union, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All child care workers, recreation workers, cooks, housekeepers, house parents, and maintenance men employed by the Respondent in its Residential Treatment Program at Springfield, Ohio; excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its facility located at Springfield, Ohio, copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including

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7. In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. July 19, 1979.

John A. Penello, Member
Betty Southard Murphy, Member
John C. Truesdale, Member

(Seal) National Labor Relation Board

Opposition

Supreme Court, U.S.
FILED
OCT 14 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-171

In the Supreme Court of the United States

OCTOBER TERM, 1981

OESTERLEN SERVICES FOR YOUTH, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board abused its discretion in determining that, in the circumstances of this case, a conversation between the union's election observer and an employee who was waiting to vote while polling was closed because the Board's agent was away temporarily did not warrant setting aside a representation election.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A1-A4) is not officially reported. The Board's Decision and Order (Pet. App. A6-A16) is reported at 243 N.L.R.B. 563.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 1981, and a timely petition for rehearing was denied on June 8, 1981. The petition for a writ of certiorari was filed on July 20, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In attempting to insure as much as possible the maintenance of "laboratory conditions" surrounding representation elections, the Board has adopted a strict rule against union and employer election observers engaging in "prolonged conversation" with employees who are waiting in line to vote. See *Milchem, Inc.*, 170 N.L.R.B. 362 (1968). In *Milchem* the Board announced that it would not inquire into the substance of any extended conversation and instead would simply require a new election if objection were made. The reason for the rule is, as the Board explained, "nothing more than a preventive device to enforce the ban against electioneering in polling places * * *." *Id.* at 362-363.

Even as the Board announced its new prophylactic rule, however, it recognized that there invariably would be some conversation between observers and voters and that it would be inappropriate to void every election involving "any chance, isolated, innocuous comment or inquiry by an employer or union official to a voter * * *." 170 N.L.R.B. at 362-363. Instead, the Board declared its intention that "this rule will be informed with a sense of realism." *Ibid.*

2. On July 20, 1978, the Service, Hospital, Nursing Home and Public Employees Union, Local No. 47, filed a representation petition requesting certification as the collective bargaining agent for certain of petitioner's employees (App. 1).[1] A Board-directed election was held on October 20, 1978 (*id.* at 8). During the election, the Board agent absented himself from the voting area for ten minutes to go to the bathroom. While the agent was gone, three employees

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[1] "App." refers to the Appendix filed by the Board in the court of appeals.

entered the polling area to vote. They were told that they would have to wait until the agent returned and two of them left the area (Pet. App. A-2; App. 39).[2]

One of the employees decided to wait at the polling place until the agent returned. She seated herself behind the observers' table and began a conversation with the Union's observer, which apparently lasted about five minutes. The two discussed their work schedules and the fact that one employee had remained on the job a whole week, as opposed to the more customary one day, before deciding to quit the job (Pet. App. A2 to A3; App. 38-39).

The result of the election was that the employees voted 17 to 12 in favor of having the Union represent them (Pet. App. A1). Petitioner filed objections to the election with the Board, claiming, *inter alia*, that the conversation between the Union's observer and the employee violated the integrity of the election and therefore its results should be set aside (*id.* at A8).

After an administrative investigation, the Regional Director rejected petitioner's objections and the Board declined to review the Regional Director's decision. The Union therefore was certified as the collective bargaining agent for the relevant unit of petitioner's employees (Pet. App. A8).

When petitioner refused to bargain with the Union, the Board charged it with violating Sections 8(a)(1) and (5) of the National Labor Relations Act (29 U.S.C. 158(a)(1) and (5)) and based on the findings from the representation proceedings ordered it to bargain with the Union (Pet. App. A6 to A16). When petitioner refused, the Board petitioned the court of appeals to enforce the order.

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[2]Both returned sometime later and both did vote (Pet. App. A2).

3. The court of appeals in a per curiam order upheld the Board's decision (Pet. App. A1-A4). It held "that the record supports the Board's finding that the Union observer's conversations constitute nothing more than 'innocuous' conversation that did not constitute electioneering" (*id.* at A3).

On July 8, 1981, Justice White denied a stay of the court of appeals' judgment pending the disposition of the present petition. On August 28, 1981, the full Court denied a further application for a stay.

ARGUMENT

The decision of the court of appeals does not conflict with the decision of any other court of appeals and in any event is clearly correct. Further review by this Court therefore is unwarranted.

Petitioner's basic argument (Pet. 8-15) is that the decision of the Sixth Circuit in the instant case conflicts with the Seventh Circuit's decision in *Midwest Stock Exchange* v. *NLRB*, 620 F. 2d 629, cert. denied, 449 U.S. 873 (1980). In *Midwest Stock Exchange*, the Board declined to set aside an election where the union's observer conversed with an employee for about five minutes while she was waiting in line with many other employees to vote. 620 F. 2d at 631-632. The Seventh Circuit concluded that the Board's decision in *Milchem, Inc., supra*, requires an election to be set aside whenever a conversation between the union observer and employee lasts for at least five minutes. Since the Board had never repudiated this "strict" rule, the court held that it could not enforce the Board's order. *Midwest Stock Exchange* v. *NLRB, supra*, 620 F. 2d at 633-635.

There are, however, significant factual differences between this case and that one. In that case the union's election observer had engaged in several conversations, including a five-minute conversation in the polling area with an

employee who was waiting in a long line to vote. Here, by contrast, the conversation did not take place while employees were waiting in line, but was an isolated incident involving only one employee. Indeed, the case involves the very unusual situation where the polling place was temporarily closed and no other prospective voter was in the area.

The Board previously has recognized the significance of the conversation's setting. In *Pastoor Bros. Co.*, 223 N.L.R.B. 451 (1976), the Board held *Milchem* inapplicable "because the polls were not open, balloting had not begun, and no other employees were present when the exchange occurred." See also *Lincoln Land Moving & Storage, Inc.*, 197 N.L.R.B. 1238 (1972). The situation in the instant case is not a classic *Milchem* situation such as that presented in *Midwest Stock Exchange* and therefore it is far from clear that the Seventh Circuit would reach the same result in this case as it did in that case.[3]

In any event, the decision below is clearly correct. Contrary to suggestions in the Seventh Circuit's opinion in *Midwest Stock Exchange*, the Board's decision in *Milchem* was never intended to be, and has never been applied as, an ironclad rule that conversations that last a certain number of minutes require a new election without any regard to the content or context of the conversations. The Board consistently has assessed the circumstances surrounding the conversation to determine whether it occurred by chance and whether it appeared innocuous. See, *e.g.*, *Cumberland Nursing & Convalescent Center*, 248 N.L.R.B. 322, 323 n.8 (1980); *Pastoor Bros. Co., supra; Monroe Manufacturing*

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[3]Apparently, the Sixth Circuit was not convinced that its decision was irreconcilable with that of the Seventh Circuit. It quoted from *Midwest Stock Exchange* with regard to the general purpose behind the *Milchem* rule, but found no need to discuss it in concluding that the rule had not been violated in this case (Pet. App. A3).

Co., 200 N.L.R.B. 62 (1972); *Lincoln Land Moving & Storage, Inc., supra; Modern Hard Chrome Service Co.*, 187 N.L.R.B. 82 (1970). Such an inquiry is required by the mandate in *Milchem* to apply its rule with "a sense of realism." *Milchem, Inc., supra*, 170 N.L.R.B. at 363.

This threshold determination of whether the conversation arose in circumstances that might have affected the fairness of the election is one of those "matters which Congress entrusted to the Board alone." *NLRB* v. *Waterman S.S. Corp.*, 309 U.S. 206, 226 (1940). Accordingly, reviewing courts must limit their inquiry, as the Sixth Circuit did in this case, to whether the Board's determination falls within its "wide degree of discretion." *NLRB* v. *A.J. Tower Co.*, 925 U.S. 324, 330 (1946). The court of appeals' affirmance of the Board's application of its *Milchem* rule to the facts of this case was therefore proper.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1981